proper application of the *per se* rule and repeatedly has warned against the dangers of applying the rule to business conduct that is not "manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977). As the court of appeals' decision illustrates, however, lower courts all too frequently ignore these warnings and allow plaintiffs to use the presumptions of the *per se* rule – coupled with the threat of treble damages – to attack business conduct that, in fact, enhances competition. *Amici* believe that the Court should take this opportunity to establish clearly that *per se* condemnation is the exception, not the rule, under the federal antitrust laws and has a very limited role to play in the analysis of joint ventures.

A. The *Per Se* Rule Of Antitrust Liability Condemns Conduct That Has No Purpose Or Effect Other Than To Diminish Competition

1. The purpose of the antitrust laws is to protect consumers from conduct that makes markets less competitive. *See, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (*"BMI"*). Although Section 1 of the Sherman Act, by its terms, prohibits all agreements "in restraint of trade," 15 U.S.C. § 1, the Court recognized shortly after the statute's enactment that this proscription could not be read literally. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). This is because "every commercial agreement restrains trade." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). For almost a century, therefore, the Court has held that "[w]hether [an] action violates § 1 of the Sherman Act depends on whether it is adjudged an *unreasonable* restraint." *Ibid.*

An unreasonable restraint of trade is one that harms consumers by raising the overall market price of a good or service or decreasing the total quantity sold. *BMI*, 441 U.S. at 19-20. The judicial inquiry into whether a specific restraint has this effect necessarily depends on the

economics of the market and the restraint at issue. *See NCAA v. Board of Regents*, 468 U.S. 85, 103-104 (1984). *See also* 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1500 (2d ed. 2003) (the inquiry into the "reasonableness" of a restraint must be "disciplined by the purposes of the antitrust laws" and instructed "by knowledge of the economy generally or by experience with the particular market under scrutiny").

Historically, the Court has applied either of two basic modes of analysis in determining whether a challenged restraint is unreasonable under the antitrust laws: the rule of reason or the *per se* rule. More recently, the Court has developed a third mode of analysis – the so-called "quick look" rule of reason approach. *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *NCAA*, 468 U.S. at 109-110. All three modes of analysis, however, are merely variations of the rule of reason. The differences among them relate to the strength of the legal presumptions that apply under each rule and the allocation of various burdens in each analysis.

2. This Court and the lower courts have long recognized that "[t]he war of all against all is not a good model for any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment." *Polk Bros. Inc. v. Forest City Enters. Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) (Easterbrook, J.). Rule of reason analysis, therefore, is an inquiry into whether the *net* effect of a particular type of business conduct is to enhance competition in the marketplace, or to diminish it. *See Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). "To determine that question," Justice Brandeis wrote in his classic formulation of the rule, "the court must ordinarily consider the facts peculiar to the business in which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Ibid.*

As applied in practice, the rule of reason imposes a series of shifting burdens on litigants. First, the plaintiff

must prove that an agreement between two or more market participants has or is likely to have an adverse effect on competition. If the plaintiff is successful, the burden then shifts to the defendant to show that the agreement has procompetitive effects. If the defendant makes this showing, the burden shifts back to the plaintiff to prove that the agreement at issue is not reasonably related to the achievement of the agreement's procompetitive effects. *See, e.g., Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). Ultimately, the issue is whether the anticompetitive effects of the agreement outweigh the procompetitive effects. *See, e.g., GTE Sylvania*, 433 U.S. at 54-55 (weighing the benefits of enhanced interbrand competition against the loss of intrabrand competition).[2]

3. The *per se* rule is a specific application of this analytical framework. *See* Robert H. Bork, *The Antitrust Paradox* 18 (1978). As the Court explained in *BMI*, judicial experience has taught that certain types of agreements are so "plainly anticompetitive" and lacking "any redeeming virtue" that "they are conclusively presumed illegal without further examination under the rule of reason." *BMI*, 441 U.S. at 8.

In *per se* cases, courts presume not only that the plaintiff satisfies its burden of proof by showing the defendant has engaged in one of these types of conduct, but also that there is no evidence the defendant could offer to justify the presumptively anticompetitive conduct. For example, when two direct competitors reach an agreement, the *only* effect of which is to fix their prices or limit their sales, there is no plausible procompetitive justification for such conduct. "Horizontal price fixing and output limitation are ordinarily condemned as a matter of law

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[2] "Quick look" rule of reason analysis applies when the defendant can make a showing that the conduct at issue has arguable procompetitive effects, but "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n*, 526 U.S. at 770.

under an 'illegal *per se*' approach because the probability that these practices are anticompetitive is so high." *NCAA*, 468 U.S. at 100.

The reason that a *per se* approach is appropriate in circumstances where the conduct at issue has no possible procompetitive effects is because the benefits of such a rule in terms of certainty and judicial economy outweigh the cost of the rule's rigidity. *See GTE Sylvania*, 433 U.S. at 49-50 & n.16. To be sure, this means that the *per se* rule may condemn certain conduct that does not lessen competition. But such overbreadth is tolerated in cases where the conduct at issue has no possible procompetitive effects: "Little is lost when the court condemns a restraint that was harmless because the defendants lacked [market] power but that was socially useless in any event." 7 Areeda & Hovenkamp, *supra*, ¶ 1509c.

B. Over The Last Three Decades, This Court Has Relied On New Economic Learning And Judicial Experience To Narrow Application Of The *Per Se* Rule

If the *per se* rule is applied too broadly, and reaches conduct that enhances competition, it can be quite costly. The rule requires a plaintiff to make only a limited showing, *i.e.*, that the conduct at issue falls within a proscribed category. Having satisfied that burden, along with a showing of injury, the plaintiff is entitled to treble damages. *See* 15 U.S.C. § 15(a). The promise of such large damage awards in return for a limited investment of litigation resources encourages plaintiffs and their counsel to bring lawsuits, particularly class action lawsuits, based on *per se* theories. "The *per se* rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362-1363 (5th Cir. 1980).

The threat of *per se* liability for treble damages has, of course, an equal and opposite effect. Unless the rule's reach is carefully circumscribed, the potential for liability

will discourage individuals and businesses from engaging in conduct that creates new goods and services, enhances economic efficiency, and benefits consumers.

Recognizing that broad application of the *per se* rule will undermine the purposes of the antitrust laws, the Court has narrowed the categories of conduct to which the rule applies. Over the last three decades, the Court has relied on new economic learning and judicial experience to hold that the *per se* rule should no longer apply to various forms of conduct that may have procompetitive effects. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court reversed *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), where it had held that a manufacturer's competitive restrictions on the distribution of its goods, *e.g.*, the assignment of exclusive sales territories to its distributors, was subject to the *per se* rule. The Court held, instead, that such conduct should be judged under the traditional rule of reason standard. It emphasized that "[t]he market impact of [such] restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and yet stimulation of interbrand competition," and that "*per se* rules in this area may work to the detriment of the small businessmen who operate as franchisees" because it discourages firms "from using the franchise system to achieve efficiencies that it perceives as important to its successful operation." *GTE Sylvania*, 433 U.S. at 51, 57 & n.26.

Likewise, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Court rejected the application of the *per se* rule to all "group boycotts." In that case, members of a wholesale purchasing cooperative refused to allow one of their competitors to participate, thus depriving it of the benefit of the cost savings enjoyed by the other rivals. The Court applied the rule of reason, finding that the business activities of purchasing cooperatives "are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be 'designed to

increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 295 (quoting *BMI*, 441 U.S. at 20). *See also Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (*per se* rule against group boycotts does not apply to single buyer's decision to purchase from one seller rather than another).

The Court's narrowing of the application of the *per se* rule has involved price restraints as well. Most recently, in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Court overruled *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and held that the *per se* rule should no longer apply to agreements to establish maximum resale prices. The Court found that "there is insufficient economic justification for *per se* invalidation of vertical maximum price fixing," observing that such conduct is likely to lead to lower prices, which benefit consumers. 522 U.S. at 15, 18. Indeed, the Court found that application of the *per se* rule in this context "could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist dealers" by forcing dealers to eliminate their small independent distributors and, instead, to sell directly to customers (thereby ensuring there is no "agreement" that could give rise to antitrust liability). *Id.* at 18.

Consistent with its limiting of the reach of the *per se* rule, the Court emphasized that the "prevailing standard" of antitrust analysis is the rule of reason, *GTE Sylvania*, 433 U.S. at 49, and has warned the lower courts to apply the *per se* rule only when the challenged conduct is a "naked restraint[] of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Indeed, precisely because "easy labels do not always supply ready answers" in the antitrust context, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *BMI*, 441 U.S. at 8-9. And, because overly broad application of the *per se* rule can undermine the purposes of the antitrust laws, the Court has cautioned that any "departure from the rule-of-reason standard must be based upon demonstrable effect rather than . . . upon

formalistic line drawing." *GTE Sylvania*, 433 U.S. at 58-59.

C. The Court of Appeals' Application Of The *Per Se* Rule To Joint Ventures Is Inconsistent With This Court's Precedents

1. For much of the 20th Century, courts viewed joint ventures between competitors with suspicion, and sometimes condemned them as *per se* unlawful. But, in 1964, in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, this Court rejected that analytical approach. Noting the increasing importance of joint ventures to the growth and competitiveness of the post-war economy, the Court directed the lower courts to evaluate the lawfulness of joint ventures through a careful analysis of the markets at issue and the venture's likely competitive effects on those markets, *i.e.*, by using the rule of reason type of approach that courts use to evaluate the legality of business mergers. *See also NCAA*, 468 U.S. at 103 (rule of reason applies to joint ventures because "a joint selling agreement may be so efficient that it will increase the sellers' aggregate output and thus be procompetitive.").

Subsequently, in *BMI* and *Pacific Stationery*, the Court reversed lower court decisions that had held the joint ventures at issue in those cases to be *per se* unlawful. It did so notwithstanding the fact that the cases involved agreements among competitors to sell a combined product at a unified price (*BMI*) and to purchase products collectively at unified prices (*Pacific Stationery*). The Court acknowledged that the BMI joint venture "involve[d] 'price fixing' in the literal sense," but warned that "[l]iteralness is overly simplistic and often overbroad." *BMI*, 441 U.S. at 9. Because joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively . . . such combinations are judged under the rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

2. Consistent with this analytical framework, the Court has found that there are two exceptional circumstances in which the *per se* rule may be applied in the joint venture context. First, a purported joint venture is *per se* illegal if it is a sham, *i.e.*, an arrangement that holds no promise for increasing competition or economic efficiency, but instead is simply a cloak for engaging in price fixing. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-598 (1951).

The second exception involves certain types of "ancillary restraints." The courts have long recognized that joint ventures typically contain ancillary restraints, which are restrictions on the joint venture partners' competitive behavior *outside* the venture that are designed to promote the achievement of the venture's procompetitive objectives. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-282 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899). For example, if two automobile manufacturers form a joint venture to produce a new type of car, they may agree not to develop cars that would compete with the joint venture's product.

Ancillary restraints generally carry "a presumption of lawfulness" and are evaluated under the rule of reason, *see* 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1904 (2d ed. 2005), because restrictions of this type "contribute to the success of a cooperative venture that promises greater productivity and output." *Polk Bros.*, 776 F.2d at 189. If, however, a joint venture's partners agree to restrict competition between themselves in a manner that is wholly unrelated to the achievement of the joint venture's procompetitive purpose, such restraints may be subject to *per se* condemnation. Thus, if the two automobile manufacturers in the example above agree to fix the prices of cars that each separately produces outside of the joint venture, that restraint is wholly unrelated to the procompetitive purpose of the joint venture and may be condemned under the *per se* rule. *See, e.g., BMI*, 441 U.S. at 19-20; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

3. The cases before the Court involve joint ventures in which petitioners, two oil companies, integrated their oil refining operations, including marketing and sales, and then set the price for the commonly produced gasoline that the ventures sell under two different brand names. The court of appeals held that the joint ventures' price-setting activities are subject to *per se* rule analysis. Pet. App. 12a-13a. This holding does not just ignore the Court's teaching with respect to the proper role of the *per se* rule in antitrust analysis of joint ventures, it stands that teaching on its head.

The court of appeals begins with the presumption that an agreement between two joint venture partners as to the price to be charged for their commonly produced product is subject to the *per se* rule, and then places the burden on the partners to prove that such conduct falls within "an exception to the *per se* prohibition on price-fixing." Pet. App. 12a. But neither of the two narrow circumstances in which the *per se* rule might apply to a joint venture are present in this case. First, the court of appeals acknowledges that the joint ventures are not shams, finding that there is a "voluminous record documenting the economic justifications for creating the joint ventures," *id.* at 4a, and observing that they were also reviewed and approved by federal and state antitrust enforcement agencies, *id.* at 5a.

Second, the price-setting conduct at issue is not an ancillary restraint because it does not restrict the ability of the joint venture partners to compete outside of the venture. It is, on the contrary, ordinary business conduct that is integral to the venture itself. Every joint venture that produces a good or service must set the price of its products. As Professor Hovenkamp concludes in discussing the example of an automobile joint venture: "Once the [joint venture] automobiles are manufactured, they are jointly owned and cannot be sold without agreement between the owners as to the price that will be charged for them"; this is not "*per se* unlawful price fixing." 11 Hovenkamp, *supra*, ¶ 1908e. Indeed, as petitioners and other *amici* explain, this is not conduct to which Section 1

of the Sherman Act should apply at all. And this is true regardless of whether the joint venture partners have completely combined, or only partially combined, their business assets in the joint venture. *See* 7 Areeda & Hovenkamp, *supra*, ¶ 1478c ("once a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their *nonventure* business should generally be regarded as those of a single entity rather than the parents' daily conspiracy") (emphasis supplied).

Were the Court to apply Section 1, however, its precedents establish that where, as here, a joint venture has the promise of enhancing economic efficiency and competition, it cannot be subject to *per se* condemnation. The fact that a joint venture's partners, as part of their activities, set prices or fees relating to the venture's product does not change this conclusion. "When two partners set the price of their goods or services they are literally 'price-fixing,' but they are not *per se* in violation of the Sherman Act." *BMI*, 441 U.S. at 9. *See also Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59 (1st Cir. 2002) (rejecting *per se* treatment of restraint on players' salaries); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) (rejecting *per se* treatment of distribution joint venture's setting of fees paid to retailers); *National Bancard Corp. v. Visa U.S.A.*, 779 F.2d 592, 602 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) (rejecting *per se* treatment of agreement among Visa members to charge an interchange fee). The court of appeals' decision reverses this long-standing rule, and subjects joint venture partners to the risk of *per se* liability for engaging in ordinary business conduct that enhances competition.

D. The Court of Appeals' Holding Harms The Ability Of Financial Service Businesses To Compete By Threatening Their Network Joint Ventures

Unless reversed, the court of appeals' decision will place a cloud of uncertainty around all types of joint ventures, including financial services network joint ventures. This uncertainty, in turn, will encourage lawsuits – particularly class action lawsuits – by plaintiffs hoping to capitalize on the minimal burdens the *per se* rule imposes. The threat of such liability is a powerful deterrent to the use of joint venture structures and to future investment in financial services networks. This Court has repeatedly warned that the risk of "false condemnations [in antitrust cases] 'are especially costly, because they chill'" procompetitive behavior by businesses. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). The Court's concern is especially acute in circumstances in which plaintiffs can seek to invoke the *per se* rule and thereby avoid having to prove that the conduct at issue actually lessens competition.

If legal uncertainty undermines investment in financial services networks, the adverse effects will be felt throughout our nation's economy. Financial services networks will become less efficient, and perhaps fewer in number. New forms of payment networks may never develop. Smaller banks and financial institutions will be disproportionately affected because financial services networks afford them the advantages of scale and geographic scope that the larger competitors may already enjoy. *Cf. Khan*, 522 U.S. at 18 (threat of *per se* condemnation may force manufacturers to eliminate their small independent distributors); *GTE Sylvania*, 433 U.S. at 57 n.26 (threat of *per se* condemnation "may work to the ultimate detriment of the small businessman"). In the end, businesses, consumers and the economy as a whole will

suffer from the declining investment in and growth of our financial services industry.

CONCLUSION

For the reasons set forth above and in petitioners' briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

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TEXACO, INC., *Petitioner,*

v.

FOUAD N. DAGHER, et al., *Respondents.*

SHELL OIL COMPANY, *Petitioner,*

v.

FOUAD N. DAGHER, et al., *Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

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MOTION OF THE AMERICAN PETROLEUM INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Petroleum Institute ("API") hereby seeks leave, pursuant to this Court's Rule 37.3, to file the attached brief as an amicus curiae in support of Petitioners Texaco, Inc. and Shell Oil Company. Petitioners have consented to the filing of this brief, but Respondents have declined to grant their consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

API, a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry. API's more than 400 members cover all

facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question concerning the legal standard for evaluating joint ventures under the antitrust laws. Joint ventures play a significant role in the oil and natural gas industry, and many of API's members are participants in joint ventures. API's members therefore have a strong interest in the antitrust standards that apply to joint ventures, including the scope of per se illegality under the antitrust laws, so that they are not deterred from participating in legitimate, procompetitive joint ventures.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the antitrust laws. API has participated as an *amicus curiae* in other antitrust cases in this Court, including *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (scheduled for oral argument on Oct. 31, 2005), *State Oil Co. v. Khan*, 522 U.S. 3 (1997), and *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented and its significance. Accordingly, API respectfully seeks the Court's leave to file the attached brief supporting Petitioners.

Respectfully submitted.

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QUESTION PRESENTED

Whether it is per se illegal under Section 1 of the Sherman Act for participants in a lawful, economically integrated joint venture to enter into an agreement concerning the prices to be charged for products produced and sold by the joint venture.

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INTEREST OF AMICUS CURIAE

The American Petroleum Institute ("API"), a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry.[1] API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question concerning the legal standard for evaluating joint ventures under the antitrust laws. Joint ventures play a significant role in the oil and natural gas industry, and many of API's members are participants in joint ventures. API's members therefore have a strong interest in the antitrust standards that apply to joint ventures, including the scope of per se illegality under the antitrust laws, so that they are not deterred from participating in legitimate, procompetitive joint ventures.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for API states that no counsel for a party authored this brief in whole or in part, and that no person other than API, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT

1. In 1998, Petitioners Texaco, Inc. and Shell Oil Co. formed two joint ventures for the purpose of refining, transporting, and marketing gasoline in the United States. One joint venture, Motiva, was formed by Petitioners and a third partner to operate Petitioners' combined downstream assets in the eastern United States.[2] Petitioners formed a second joint venture, Equilon, to operate their downstream assets in the western United States. Only the Equilon joint venture remains at issue before this Court.[3]

Petitioners contributed all of their downstream assets in the United States to the new entities, including "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees." Pet. App. 4a n.3. Petitioners agreed to divide Equilon's profits or losses according to a fixed ratio (56 per cent to Shell, 44 per cent to Texaco), based on the value of the assets that each partner contributed to the joint venture.

Petitioners also granted Equilon an exclusive license to sell gasoline under the Shell and Texaco brand names in the western United States. Petitioners decided that Equilon would maintain both the Texaco and Shell brands

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[2] "Downstream" operations include refining and marketing gasoline and other petroleum products. Shell Pet. App. 2a n.1. (hereinafter "Pet. App."). "Upstream" operations include exploration for and production of crude oil and natural gas. *Id.*

[3] The district court entered summary judgment in favor of Petitioners on all Respondents' claims involving Motiva, on the ground that Respondents never purchased any products from Motiva. Pet. App. 62a-74a. The court of appeals affirmed that ruling, and it has not been challenged in this Court. *Id.* at 9a-11a.

rather than sell gasoline under a single brand. It was further decided that Shell-branded and Texaco-branded gasoline would be sold at the "same price in the same market areas," Pet. App. 5a, and that Equilon would determine the price.[4]

Petitioners continued to compete with each other in a variety of areas that are outside the scope of the joint venture, including upstream operations, foreign operations, chemicals, aviation fuels, and marine fuels. Pet. App. 47a. The joint venture agreement was subject to termination at any time by mutual consent of the parties, or by either party after five years (subject to two years' notice). Pet. App. 4a.[5]

The Federal Trade Commission and the attorneys general of California, Hawaii, Oregon, and Washington conducted an extensive investigation of the proposed Equilon joint venture. At the close of the investigation, the FTC and Petitioners entered into a consent decree that required divestiture of certain assets but did not restrict Equilon's pricing decisions. *See In re Shell Oil Co.*, 125 F.T.C. 769, 778-811 (1998).

2. Respondents, a class of approximately 23,000 operators of Shell and Texaco service stations in the western United States, filed this action in 1999 alleging that Shell and Texaco entered into a per se unlawful agreement to fix prices under Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondents expressly "disclaimed

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[4] The court of appeals stated that this decision was made "either immediately before the formation of the joint ventures or sometime shortly thereafter." Pet. App. 4a-5a.

[5] In 2002 Shell acquired Texaco's interest in Equilon, in accordance with conditions that the FTC imposed on the combination of Texaco and Chevron. *See In the Matter of Chevron Corporation*, FTC Docket No. C-4023 (Decision and Order entered January 4, 2002).

any reliance on the traditional 'rule of reason' test." Pet. App. 6a.

The district court entered summary judgment for Petitioners. The court found that Equilon was an economically integrated joint venture formed to realize efficiencies and cost savings estimated to be worth hundreds of millions of dollars annually. Pet. App. 41a-42a. In rejecting Respondents' per se argument, the district court observed that "every . . . joint venture must, at some point, set prices for the products they sell." *Id.* at 43a. The court concluded that Respondents' per se approach would amount to "a per se rule against joint ventures between companies that produce competing products." Pet. App. 45a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-35a. The majority acknowledged that "there is a voluminous record documenting the economic justifications for creating the joint ventures," including Petitioners' determination "that numerous synergies and cost efficiencies would result" from the joint ventures, yielding "up to $800 million in cost savings annually." Pet. App. 3a. The court of appeals also recognized that the joint ventures "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." Pet. App. 4a. The majority nevertheless concluded that the agreement to establish a unified price for the joint venture's products should be deemed a "naked" restraint of trade, and held to be a per se violation of Section 1 of the Sherman Act, absent a showing that it was "reasonably necessary to further the legitimate aims of the joint venture." *Id.* at 28a. The majority held that Petitioners had failed to make such a showing. *Id.*

The court rejected Petitioners' explanation that the unified pricing provision was intended to avoid potential actions for price discrimination under the Robinson-